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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 244

JOHN CZEPIL,

Petitioner,

—v.—

LEWIS B. HERSHEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled action on March 12, 1970.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit, filed March 12, 1970, is not yet reported and is printed in the appendix hereto (PA-1 through PA-4). There was no opinion by the United States District Court for the Northern District of Illinois.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

1. Whether the provisions of Section 1604.52(c) of the Selective Service Regulations (32 C.F.R., Section 1604.52 [c]) requiring that members of local selective service boards "if at all practicable, be residents of the area in which their local board has jurisdiction" is mandatory, and whether violation of such regulation deprives the local board of jurisdiction to issue an order to report for induction.

2. Whether the petitioner can proceed by way of an action in mandamus under 28 U.S.C. §1361, and declaratory judgment under 28 U.S.C. §§2201, 2202, to compel reconstitution of the local draft board and to enjoin respondents from inducting petitioner into the Armed Forces, or whether the provisions of such regulation can only be enforced by means of *quo warranto* proceedings.

3. Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 App. U.S.C. §460(b)(3)) prohibits a federal court from reviewing, in a direct pre-prosecution civil action, the validity of an order to report for induction issued by a Selective Service local board which was illegally constituted in violation of Selective Service Regulation §1604.52(c).

4. Whether it is a denial of due process of law to hold that an induction order issued by an illegally constituted local board may not be judicially reviewed either by collateral attack as a defense to a criminal prosecution or by direct attack in a pre-prosecution civil proceeding to enjoin the induction order.

Statutes and Regulations Involved

This case involves the due process clause of the Fifth Amendment to the United States Constitution.

Also involved are the following provisions of the Military Selective Service Act of 1967, see Title 50 U.S.C., Appendix, Sections 451 *et seq.*:

Section 10(b)(3), 50 App. U.S.C., §460(b)(3):

> " . . . but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction . . . "
>
> * * * * *
>
> " . . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards,

appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant . . . "

A provision of the Selective Service Regulations, Title 32 C.F.R., is likewise involved:

Section 1604.52(c);

"(c) The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction, and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age."

Statement of the Case

Petitioner requests that this Court grant *certiorari* to review a decision of the United States Court of Appeals for the Seventh Circuit, affirming a judgment of the District Court which dismissed a suit brought by the petitioner.

Petitioner, aged 22, is a conscientious objector registered with Selective Service Local Board No. 44, in Chicago, Illinois (PA-8, PA-10, PA-13). That board is in an area where, according to the 1960 United States Census, there are over 40,000 residents (PA-11).

On April 28, 1969, Local Board No. 44 mailed petitioner an order to report for induction on May 15, 1969 (PA-13). On May 2, 1969, petitioner wrote to the board requesting the special form for conscientious objectors (SSS Form 150) (PA-13). The board mailed the form to the petitioner on

May 6, 1969, and postponed his induction until an undesignated date (PA-13). Within thirty days after receiving the form, the petitioner completed and returned it to the board (PA-13, PA-14).

Petitioner attended a meeting of the board on June 10, 1969, following which the board sent him a letter refusing to reopen his classification (PA-14, PA-16). Petitioner thereafter submitted new materials in support of his claim, but again the board refused to reopen. Petitioner then commenced this action (PA-16).

This suit was instituted pursuant to 28 U.S.C. §1361 (mandamus), 28 U.S.C. §§2201, 2202 (declaratory judgment), and 28 U.S.C. §1331 (federal question). In his suit, petitioner sought: (a) *mandamus* requiring the respondents to exercise their power to reconstitute Selective Service Local Board No. 44 so that its members would be residents of an area over which the Board had jurisdiction; (b) *mandamus* requiring the members of Local Board No. 44 to process petitioner's application for conscientious objector status pursuant to the Selective Service System's rules, regulations and memoranda; (c) an injunction restraining the respondents from inducting petitioner into the Armed Forces of the United States during the pendency of the action; (d) a declaratory judgment that Local Board No. 44 is illegally constituted; and (e) a declaratory judgment that the induction order issued to the petitioner by the board is void (PA-18, PA-19).

In the complaint petitioner alleged that of the four members of Local Board No. 44, two were not residents of the area in which the board has jurisdiction, and the residences of the other two members could not be determined

after diligent attempts on the part of the petitioner to obtain such information (PA-10 through PA-12).

Petitioner moved for a preliminary injunction, and at the hearing, the attorney for the government made a motion to dismiss the action on the grounds of Section 10 (b)(3) of the Military Selective Service Act of 1967 (50 App. U.S.C. §451 *et seq.*). The District Court orally granted the government's motion dismissing the complaint (PA-5).

The United States Court of Appeals for the Seventh Circuit reviewed the decision of the District Court on the merits, and affirmed the dismissal of the action (PA-1 through PA-4).

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question presented is one of great importance and there is a widespread conflict between certain decisions of courts of appeals and decisions in a number of district courts. This Court has held that in cases where there is a) an important question and b) a conflict between circuit court decisions and district court decisions, certiorari will be granted. *Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964); *United States* v. *Constantine*, 296 U.S. 287, 290 (1935).

Since this case comes up on the granting of a motion to dismiss the complaint, all of the allegations of the complaint must be accepted as true.

The Importance of the Question

The issue presented for review is not simply the technical construction of an administrative regulation. The issue is whether the entire concept of local selective service boards, the so-called "little group of neighbors," is to be a genuine working system which guarantees to draft registrants a careful, sympathetic and understanding consideration of his claim for deferment.

One of the most vigorously criticized defects of the Selective Service System is that the so-called "local boards" are not local at all and not in the least representative of the residents of the communities which they serve. The Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve* (1967) (The Marshall Commission) identified this problem and recommended a centralized office for the purpose of handling the function of classification. Yet, Congress, in its recent enactment of the 1967 Military Selective Service Act, rejected the recommendation of the Marshall Commission and continued the present system of so-called "local boards."

Congress emphasized the importance of the local nature of selective service boards and the confidence of citizens in such boards.[1]

The House Report stated:

"To modify this proven system . . . would in the opinion of the committee completely disregard the most

[1] Sen. Rep. No. 209, 90th Cong., 1st Sess. 9-10 (1967); H. Rep. No. 267, 90th Cong., 1st Sess. 32-33 (1967); 1967 U.S. Code Cong. & Ad. News 1308, 1335; Conf. Rep. No. 346, 90th Cong., 1st Sess. (1967); 1967 U.S. Code Cong. & Ad. News 1352, 1356.

important attribute of the present system, that is, the confidence of the people in a system that they themselves operate." H.R. Rep. No. 267, 90th Cong., 1st Sess. 32, 1967 U.S. Code Cong. & Ad. News 1308, 1335.

Likewise, at the hearing considering the Marshall Commission recommendation, Chairman Russell of the Senate Armed Services Committee stated:

> "In theory, that may be very well, Mr. Marshall, but the *original proposal and objective was to keep this matter as close within the range of each of these boards* to which you refer, on the premise that they had information about family hardships, good faith, personal problems, and conditions within homes that no computer yet devised could possibly ascertain, and that they would come as near to being fair as any group could be, *knowing that they had to live in that community, with the mothers and fathers of the sons with whose lives they were dealing.*" Hearings on S. 1432 Before the Senate Comm. on Armed Services, 90th Cong., 1st Sess. 136 (1967) [hereafter *1967 Senate Hearings*] (emphasis added).

The concept of a local board as a "little group of neighbors" has long been central to the Selective Service System. See *United States* v. *Nugent*, 346 U.S. 1, 8 (1953); *Knox* v. *United States*, 200 F.2d 398, 402 (9th Cir. 1952). Such decentralization was intended to foster decisional accuracy on the often highly subjective classification questions. It is respectfully submitted that public confidence in the system has waned partially because of the failure to follow those few regulations providing some procedural

guarantees to draft registrants. The flagrant violation by many local boards of the residency requirements of the Regulations, Section 1604.52(c), and therefore of the whole "Local Board" concept, is an example of this failure.

The prevalence of all white boards in black neighborhoods has frequently been attacked on other grounds, although so far unsuccessfully. *Clay* v. *United States*, 397 F.2d 901 (5th Cir. 1968), vacated and remanded on other grounds, 394 U.S. 310 (1969); *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968), cert. den. sub nom. *Sellers* v. *Laird*, 395 U.S. 950 (1969) (see concurring opinion of Justice Douglas); *United States* v. *Johnson*, 302 F. Supp. 584 (M.D. Pa. 1969); *Gee* v. *Smith*, 306 F. Supp. 891 (N.D. Ga. 1969). But see *United States* v. *Wingfield*, —— F. Supp. ——, 2 SSLR 3483 (N.D. Cal. January 7, 1970).

Senator Russell accurately identified the original purpose of local boards. The history of the Selective Service System reveals an intention to provide popular support for conscription through local draft boards in which members of the community could have genuine confidence.[2]

Judge Zirpoli of the Northern District of California has set forth sound reasons why the residency requirements

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[2] Task Force on the Structure of the Selective Service System, Report II-1-2 (1967); Selective Service System, *Outline of Historical Background of Selective Service and Chronology* 5-6 (1965); Crowder, *The Spirit of Selective Service* 115-22 (1920); *Hearings on S. 4165* Before House Comm. on Military Affairs, 76 Cong. 3d Sess. 116-17 (1940) (Statement of General Hershey); Selective Service System, *Short Course in Selective Service* 6 (1967); Memorandum of Gen. Hershey, *On Present Operations of the System and Local Draft Boards*, S. Doc. No. 82, 89th Cong., 2nd Sess. 4 (1966); Hearings before House Comm. on Armed Services, 89th Cong., 2d Sess. 9698 (1966) (Statement of General Hershey).

in §1604.52(c) of the Selective Service Regulations are mandatory rather than merely directory. In *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal. 1969) Judge Zirpoli stated:

> "A mandatory interpretation of Sec. 1604.52(c) is also consistent with the policy of the Selective Service System. Four basic assumptions of this system underline that policy. First, there is the doctrine that local board members are neighbors of the registrant. See *Ayers v. United States*, 240 F.2d 802, 809 (9th Cir. 1956); *Knox v. United States*, 200 F.2d 398, 402 (9th Cir. 1952). General Hershey urged this policy in front of Congress when he stated 'the choice (of who is to serve) is being made by the neighbors of the man * * *.' And in its budget justification for fiscal 1967, Selective Service characterized the local boards as 'little groups of neighbors.'
>
> "The second assumption is that the local board members are responsive to the community and would act under the 'continuous observation of all other members of the community.'
>
> "The third assumption is that the due process constitutional guarantees and those provided for by the Administrative Procedure Act are not necessary to the local board proceedings because of the individualized treatment the registrant receives and the informality of the board." 306 F. Supp. at 997-998.

Judge Zirpoli held that because §1604.52(c) is mandatory, failure to follow it is a violation of due process voiding the action of the local board. 306 F. Supp. at 998.

In *United States* v. *Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969), Judge Peckham, in holding that §1604.52(c) is mandatory and not directory, pointed to the need for decisional accuracy and fairness in classification procedures, and the already existing lack of safeguards for draft registrants:

> "Although there may be controversy over the extent the local board system does function as a group of 'friends and neighbors', it is abundantly clear that to allow the Selective Service to ignore 32 C.F.R. §1604.52 (c) would frustrate purposes intended to be served by the local board system and remove yet another procedural safeguard in an area of decision making already substantially stripped of traditional procedural safeguards. See, *e.g.*, 32 C.F.R. §1624.1(b) ('[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel').[3] Since the consequences of classification decisions are severe and judicial review of their accuracy is very limited (See *Estep* v. *United States*, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946); *Wills* v. *United States*, 384 F.2d 943 (9th Cir. 1967)) a violation of a regulation whose purpose is germane to insuring the accuracy of the decisional process should be considered prejudicial." 306 F. Supp. at 388.

The statutory directive that board members be residents of the County in which the board has jurisdiction, 50 App. U.S.C. §460(b)(3), is plainly inadequate. In urban areas, such as Cook County, Illinois where Local Board No. 44 has jurisdiction, neighborhood patterns vary radically from

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[3] See *United States* v. *Weller*, —— F. Supp. ——, 2 SSLR 3229 (N.D. Cal. Sept. 19, 1969) holding this regulation unconstitutional. Cert. granted —— U.S. —— (1970).

block to block. Racial, national, socio-economic and religiously homogeneous communities exist within concentrated areas of dense population. It is for these "neighborhoods" that §1604.52(c) was designed.

Having recognized the problem, and enacted a regulation to cover it, the Selective Service System should be required to comply with its own regulation. *Oshatz* v. *United States*, 404 F.2d 9, 11-12 (9th Cir. 1968); *Service* v. *Dulles*, 354 U.S. 363 (1957).

Conflict Between Circuit Courts and District Courts

There is a direct conflict between certain decisions of circuit courts of appeals and decisions of district courts. Although no circuit court has yet decided that the residency regulation is mandatory, several district courts have so found and have held that a violation of the regulation constituted grounds for acquittal in a criminal prosecution. Indeed, the number of such decisions in the Northern and Central Districts of California would make it appear that until a decision to the contrary is handed down by the Ninth Circuit, the prevailing rule in that circuit is that Section 1604.52(c) is mandatory. *United States* v. *Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States* v. *Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *United States* v. *DeMarco*, 2 SSLR 3204, Crim. No. 42377. (N.D. Cal. July 30, 1969); *United States* v. *Jones*, 2 SSLR 3392, Crim. No. 4124 (C.D. Cal. October 14, 1969); *United States* v. *McMillan*, 2 SSLR 43, Crim. No. ..... (C.D. Cal. ——).

The same principle has been strongly supported in dictum in *United States* v. *Hinch*, 292 F. Supp. 696 (W.D. Mo. 1968).

In contrast to the above decisions, the decision in the case at bar holds that the regulation need not be interpreted as mandatory. See also: *United States* v. *Brooks*, 415 F.2d 502 (6th Cir. 1969); *Jessen* v. *United States*, 242 F.2d 213 (10th Cir. 1957); *United States* v. *Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969); *United States* v. *Fisher*, 307 F. Supp. 7 (D. Conn. 1969). But see *United States* v. *Glazebrook*, —— F. Supp. ——, 2 SSLR 3207 (D. Conn. June 18, 1969).

This direct conflict among decisions of different federal courts creates confusion. The government has no guidelines as to whether it can prosecute. The *Hinch* decision projects the problem beyond the Ninth Circuit. This Court is the proper forum to resolve this conflict.

Quo Warranto *Is Not an Appropriate Remedy*

In its opinion in the case at bar, the Seventh Circuit suggests that the requirement of the regulation can only be enforced in a *quo warranto* proceeding. The Court said:

> "In *Nussbaum*, the Court held the defect is not subject to collateral attack but that the 'if at all practicable' phrase makes the area requirement directory. We agree, but as the Government concedes, persons having standing may attack the composition of Local Boards by proceedings in the nature of *quo warranto*" (PA-3).

The suggestion that "persons having standing" may attack the composition of local boards in *quo warranto* proceedings is meaningless. Obviously the Court does not consider the petitioner as a person "having standing." Yet it seems to acknowledge that some kind of direct attack on the composition of the local board may be permissible.

The action at bar is not a collateral attack on the composition of the local board but rather a direct attack in the nature of *mandamus* pursuant to 28 U.S.C. §1361. Therefore, the argument in *United States* v. *Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969) relied upon by the court below, that this question cannot be raised collaterally, is inapplicable.

Quo warranto is totally inadequate because such an action is not brought by an individual but must be brought by the government. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 502 (1932); *Territory of Nebraska* v. *Lockwood*, 3 Wall. 236, 18 L.Ed. 47 (1865).

The United States attorney has the discretion to decline to bring a *quo warranto* lawsuit. *United States* v. *Machado*, 306 F. Supp. 995, 1001 (N.D. Cal. 1969); see *Anno: Quo Warranto, Private Person's Right*, 51 A.L.R.2d 1306, 1328.

Quo warranto has been held to be available only where specifically authorized by statute. *Cleveland Cliffs Iron Co.* v. *Village of Kinney*, 262 F. 980, 984 (D. Minn. 1919); *In re Yancy*, 28 F. 445, 451 (Cir. Ct. W.D. Tenn. 1886); see also *Morin* v. *City of Stuart*, 111 F.2d 773, 775 (5th Cir. 1940).

In *United States* v. *Machado*, *supra*, the government argued that violation of the residency regulation could not be raised collaterally as a defense to a criminal prosecution, but only in *quo warranto* proceedings. Judge Zirpoli held that the remedy of *quo warranto* is entirely inadequate. He outlined the very narrow scope of *quo warranto*, and demonstrated that there was no such remedy available to the persons directly interested in enforcing the regulation. Judge Zirpoli concluded:

> "Consequently, absent a specific statute, the individual cannot bring a quo warranto proceeding nor compel the public attorney to bring such a suit. Putting this doctrine together with the result in *Nussbaum*, the registrant is left without a federal forum in which to raise his claim.. The denial of all judicial forums in which a criminal defendant can raise a defense may be a denial of due process. See Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L.Ed. 834 (1944)." 306 F. Supp. at 1001.

The suggestion by the court below that the regulation might be enforced in *quo warranto* proceedings is remarkable in the light of its own previous decision, *U. S. ex rel. Wisconsin First Federal Savings and Loan Ass'n*, 248 F.2d 804 (7th Cir. 1957), cert. den. 355 U.S. 957 (1958). In that case, Chief Judge Hastings handed down an opinion almost completely precluding *quo warranto* proceedings in the Seventh Circuit, and concluded:

> "We hold, except as otherwise specifically provided by statute, that there is no original jurisdiction in the Federal District Court to entertain an information in the nature of *quo warranto*." 248 F.2d at 809.

Thus the court below has relegated to the petitioner and to the public, as a means of rectifying a flagrant and highly prejudicial violation of Selective Service Regulations, a remedy which it has effectively interpreted as being non existent. There is no statutory authorization to bring *quo warranto* proceedings to enforce the residency requirements of the regulations.

Because it is impossible to bring a *quo warranto* proceeding, petitioner has no adequate remedy at law, and should be permitted to obtain relief in equity. Judge Zirpoli so held in *Machado, supra*:

> "When viewing the difficulty in bringing a quo warranto action for the registrant, the policy and command of 50 U.S.C. App. §460(b)(3), and the dependence of a quo warranto proceeding on the public attorney's discretion the court must conclude that such a proceeding is an inadequate remedy and therefore not exclusive." 306 F. Supp. at 1002.

Judge Zirpoli's opinion follows other cases holding that where *quo warranto* is not an adequate remedy, it is not exclusive, and the plaintiff may proceed by *mandamus* or other equitable means to obtain relief. *Columbian Cat Fanciers, Inc.* v. *Koehne*, 96 F.2d 529, 532 (D.C. Cir. 1938); *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 779 (D.C. D.C. 1959), aff'd 278 F.2d 871 (D.C. Cir. 1960); *Lapides* v. *Doner*, 248 F. Supp. 883 (E.D. Mich. 1965).

Review Is Not Barred by 50 U.S.C. App. §460(b)(3)

Section 10(b)(3) of the Military Service Act of 1967 is not a bar to review of the petitioner's selective service classification. This is readily apparent from the fact that the court below did review the decision of the District Court, did consider petitioner's claim on its merits, and did not affirm the dismissal on jurisdictional grounds.

Moreover, the complaint in the case at bar asserts that the local board is guilty of violation of its own regulations.

Therefore the holdings of this court in *Oestereich* v. *Selective Serv. System Local Board No. 11*, 393 U.S. 233 (1968) and *Breen* v. *Selective Serv. Local Board No. 16*, —— U.S. ——, 2 SSLR 3373 (January 26, 1970) apply to the fact situation at bar.[4] In *Oestereich*, this court cited with approval *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956) where the Court authorized pre-induction review of a case which involved a violation of the Selective Service Regulations.

Violation of the Selective Service Regulations constitutes "regulatory lawlessness" which compels the voiding of an order to report for induction and which is reviewable in a pre-prosecution civil suit. See *National Student Association* v. *Hershey*, 412 F.2d 1103, 1107-1109 (D.C. Cir. 1969); *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967); *Murray* v. *Blatchford*, 307 F. Supp. 1038, 1057-1058 (D. R.I. 1969); *Wiener* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). See also: *Crane* v. *Hershey*, —— F.2d ——, 2 SSLR 3040 (1st Cir. May 22, 1969); *Marsano* v. *Laird*, —— F.2d——, 2 SSLR 3106 (2nd Cir., June 16, 1969); *Carey* v. *Local Board No. 2*, —— F.2d —— (2d Cir. June 16, 1969); *Nestor* v. *Hershey* —— F.2d ——, 2 SSLR 3379 (D.C. Cir. Dec. 16, 1969), and other cases concerning pre-induction review of the right to a IS(C) classification.

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[4] The only case cited by the court below on this question (PA-4), *Clark, Attorney General* v. *Gabriel*, 393 U.S. 256 (1968), is irrelevant here. That case simply upheld the constitutionality of Section 10(b)(3) as applied to review on the merits of a local board's denial of conscientious objector classification. It did not deal with statutory or regulatory lawlessness depriving the board's action of jurisdictional validity.

The failure to comply with the residency requirements of §1604.52(c) is the kind of "regulatory lawlessness" which entitles the petitioner to pre-induction judicial review.

The effect of the decision below is to deny to a registrant all conceivable avenues to challenge the composition of Local Board No. 44. By approving *United States* v. *Brooks, supra,* and *United States* v. *Nussbaum, supra,* the Court has precluded this question from being raised as a defense to a criminal prosecution. Combined with its refusal to permit a direct action in mandamus, and the District Court's dismissal under Section 10(b)(3) [50 App. U.S.C. 460(b)(3)], the result is the effective total denial of relief from one of the most glaring and significant inequities of the Selective Service System. This constitutes a clear denial of due process of law, *United States* v. *Machado,* 306 F. Supp. 995, 1001 (N.D. Cal. 1969).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARVIN M. KARPATKIN
JOHN E. LEMOULT
1345 Avenue of the Americas
New York, New York 10019

JOSEPH BEELER
1037 Belden Avenue
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American Civil Liberties Union
Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioner

June 9, 1970

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 18055 SEPTEMBER TERM 1969—JANUARY SESSION 1970

JOHN CZEPIL,
Plaintiff-Appellant,

—v.—

LEWIS B. HERSHEY, *et al.*,
Defendants-Appellees.

Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 12, 1970

Before:

DUFFY, *Senior Circuit Judge,*
FAIRCHILD and CUMMINGS, *Circuit Judges.*

DUFFY, *Senior Circuit Judge*:

Plaintiff received an order for induction on April 28, 1969. He thereupon requested Form S.S. 150 (Special Form for Conscientious Objector). His induction was stayed. After a hearing before Local Board 44, plaintiff was denied a conscientious objector status. Plaintiff sub-

mitted additional evidence but again the Board denied him a conscientious objector status.

The case at bar is a pre-induction suit for an injunction. The principal point relied on by plaintiff is that Board 44 which issued an induction order to him, was illegally composed in that two members thereof did not reside in the specific area over which Board 44 has jurisdiction. It is not disputed that all members of the Board reside in Cook County, Illinois in which Local Board 44 is located. Plaintiff says that his claim goes not to the decision of the Board but to the legality of the Board itself.

The controlling statute is 50 USC. App. §460(b)(3) ". . . No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is . . . residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction. . . ."

The regulation promulgated under the statute (32 C.F.R. §1604.52(c)) reads: "The members of local boards . . . shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."

The only jurisdictional requirement as to place of residence of members of Board 44 is met in this case as all members thereof reside in Cook County, Illinois. The provision in the regulations that members of the Board "if at all practicable" shall reside in the area in which the Board has jurisdiction, is not mandatory. See *Jessen* v. *United States*, 242 F.2d 213, 215 (10 Cir., 1957).

A somewhat similar situation arose in *United States* v. *Brooks*, 415 F.2d 502 (6 Cir., 1969). There, a failure to comply with 32 C.F.R. §1604.52(c) was urged. The Court

said, 415 F.2d at page 505: "We consider also that the action of Local Board 20 cannot be here challenged on the ground of the lack of proper residential qualifications of some of its members. It was in all events a *de facto* board whose action is not subject to this collateral attack. The holding of the Fifth Circuit in *Clay* v. *United States, supra,* 397 F.2d at 911, supports this general view."

Plaintiff relies on two district court cases in California, *United States* v. *DeMarco,* —— F. Supp. —— (N.D. Cal., 1969) and *United States* v. *Beltran,* 306 F. Supp. 385 (N.D. Cal., 1969). However, *United States* v. *Nussbaum,* 306 F. Supp. 66 (N.D. Cal., 1969) is subsequent to *DeMarco* and *Beltran.* In *Nussbaum,* the Court held the defect is not subject to collateral attack but that the "if at all practicable" phrase makes the area requirement directory. We agree, but as the Government concedes, persons having standing may attack the composition of Local Boards by proceedings in the nature of *quo warranto.*

Plaintiff makes no explanation for the late filing of his conscientious objector claim. He had enjoyed a number of student deferments and did not raise his alleged conscientious objector claim until after he was reclassified and ordered to report for induction.

In *United States* v. *Henderson,* 411 F.2d 224, 227 (5 Cir., 1969) the Court said: "It is apparent . . . that defendant waited until he had exhausted all his deferments, until he had been classified 1-A and until military service had become imminent before seeking a conscientious objector classification. This chronology of events which comprised the defendant's Selective Service history had a direct bearing upon his sincerity and was properly considered by the appeals board in denying his claim for conscientious objector status. [Citing cases]."

In *Clark, Attorney General* v. *Gabriel*, 393 U.S. 256 (1968) where the registrant filed suit to enjoin his induction, the Supreme Court held that the draft board had exercised its statutory discretion evaluating the evidence in appellee's individual case, and had reviewed his claim. They indicated that Congress may constitutionally require that a registrant's challenges to such decisions be deferred until after induction when the remedy of habeas corpus would be available, or until defense of a criminal prosecution.

We hold that in the case at bar, nothing more is involved except the exercise of discretion by the Local Board in denying the plaintiff a reopening of his classification based upon a very late conscientious objector claim. We hold that Board 44 was and is at least a *de facto* board whose action in this case is not subject to pre-induction collateral attack.

Judgment of the District Court in dismissing the suit herein is affirmed.

Relevant Docket Entries

11/ 7/69	Filed complaint for declaratory judgment, injunction and mandamus $15.00
11/ 7/69	Filed designation
11/ 7/69	Filed affidavit re general rule 39
11/ 7/69	Filed affidavit of John Czepil. (no summons to issue per atty's instructions) G
11-10-69	Filed Affidavit pursuant to G.R. 39 by attorney Joyce for plaintiff. B
11-10-69	Filed Notice of Motion
11-10-69	Filed Memorandum of law in support of plaintiff's complaint
11-10-69	Arguments heard on motion for preliminary injunction and continued to Wednesday, November 12, 1969, 10 a.m.—Lynch, J.
	Mailed Notice 11-12-69
11-12-69	Filed Notice of motion and motion for injunction during pendency of appeal
11-12-69	Order motion of plaintiff for a temporary injunction denied and cause is dismissed—Lynch, J. (JS6)
	Mailed Notice 11-12-69 B

11-13-69	Leave to plaintiff to proceed in forma pauperis, file notice of appeal and have record on appeal prepared without prepayment of fees. Order motion of plaintiff for an injunction pending appeal denied—Lynch, J.	
	Mailed Notice 11-13-69	B
11-13-69	Filed Plaintiff's notice of appeal.	$5. pd.
11-13-69	Mailed Copy of notice of appeal to Thomas A. Foran, U.S. Attorney.	B

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 69C 2315

JUDGE LYNCH

JOHN CZEPIL,

Plaintiff,

—v.—

LEWIS B. HERSHEY, as Director of Selective Service of United States, JOHN H. HAMMACK, as State Director of Selective Service System for the State of Illinois, COL. WILLIE H. MC BEE, as Armed Forces Entrance and Examining Station Commander, Chicago, Illinois, THEODORE SANKEY, RICHARD J. BORYCA, EDWARD W. BIEDRZYCKI and THOMAS ELUKEVICH, as Members, Selective Service System Local Board No. 44, Chicago, Illinois, and LILLIE RICHARDS, as Executive Secretary of Selective Service System Local Board No. 44, Chicago, Illinois,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND MANDAMUS

Plaintiff alleges:

JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under 28 U.S.C. §1361 (an order in the nature of a mandamus to compel an officer or employee of the United States to perform a duty) and under 28 U.S.C. §§2201, 2202 (declaratory judgment). This Court also has jurisdiction pursuant to 28 U.S.C. §1331 (federal question); the matter in controversy exceeds the value of $10,000 exclusive of interest and costs, and arises under the Constitution and laws of the United States, more specifically: under the First and Fifth Amendments, under the Military Selective Service Act of 1967 (50 App. U.S.C. §451 et seq.), and under the Selective Service Regulations (32 C.F.R. Part 1600 et seq.).

PARTIES

2. Plaintiff, John Czepil, is a young man, born December 28, 1946, now 22 years of age, who is conscientiously opposed to participation in war in any form, but who is prepared to perform civilian alternative service, as provided by Section 6(j) of the Military Selective Service Act of 1967 (50 App. U.S.C. §456(j)) and the Regulations issued pursuant thereto. He has been ordered to report for induction into the Armed Forces of the United States on November 17, 1969 at the Armed Forces Entrance and Examining Station located at 615 West Van Buren Street Chicago, Illinois. His residence is 2454 West Walton Street, Chicago, Illinois 60622.

3. The defendant, Lewis B. Hershey, is the Director of Selective Service. He is the chief executive officer of the

Selective Service System and is charged with the duty of administering the provisions of the Military Selective Service Act of 1967 and the Regulations implementing that act. His official residence is 1724 F Street N.W., Washington, D.C. 20435. The defendant, John H. Hammack, is State Director of the Selective Service System for the State of Illinois. He is the chief administrative officer of the Selective Service System in the State of Illinois and is charged with the duty of administering within the State of Illinois the provisions of the Military Selective Service Act of 1967 and the regulations implementing that act. His official residence is 405 East Washington Street, Springfield, Illinois 62701. The defendant, Col. Willie H. Mc Bee, is the Armed Forces Entrance and Examining Station Commander of the Armed Forces Entrance and Examining Station located at 615 West Van Buren Street, Chicago, Illinois. He is the chief administrative officer of that induction station and is charged with the duty there-at of administering the process of induction into the Armed Forces of the United States. The defendants, Theodore Sankey, Richard J. Boryca, Edward W. Biedrzycki and Thomas Elukevich, are the Members of Selective Service System Local Board No. 44, located at 4931 West Diversey Avenue, Chicago, Illinois 60639. Local Board No. 44 is a Selective Service System Local Board created by the provisions of Section 10(b)(3) of the Military Selective Service Act of 1967 (50 App. U.S.C. §460(b)(3)) and by the provisions of Section 1604.51 et seq. of the Regulations (32 C.F.R. §1604.51 et seq.) implementing that act. It is charged with the duty of administering within its geographical area the provisions of the Military Selective Service Act of 1967 and the Regulations implementing that

act. It is the agency and instrumentality of the Selective Service System claiming immediate jurisdiction and authority over the plaintiff, who is registered with this board, and the Members of the Board have ordered the plaintiff to report for induction on November 17, 1969. The defendant, Lillie Richards, is the Executive Secretary of Local Board No. 44. She is an employee of the United States charged with the duty of assisting and executing the orders of Local Board No. 44.

CLAIM FOR RELIEF

Count I

4. Local Board No. 44 is defined geographically as the area in Chicago, Illinois bounded on the north by Division Street, on the east by Damen Avenue, on the south by Ohio Street, and on the west by Kedzie Street.

5. Plaintiff is a resident of the area in which Local Board No. 44 has jurisdiction.

6. Local Board Member Richard J. Boryca, who resides at 515 Camp McDonald Road, Prospect Heights, Illinois, is not a resident of the area in which Local Board No. 44 has jurisdiction.

7. Local Board Member Theodore Sankey, who resides at 7625 West Howard Street, Chicago, Illinois, is not a resident of the area in which Local Board No. 44 has jurisdiction.

8. Plaintiff has diligently attempted to determine the residence of Local Board Member Edward W. Biedrzycki but has been unable to do so.

9. Plaintiff has diligently attempted to determine the residence of Local Board Member Thomas Elukevich but has been unable to do so.

10. Local Board Executive Secretary Lillie Richards wrote in reply to an inquiry by plaintiff that the four persons named in paragraphs 5-8 were the Members of Local Board No. 44 but refused to divulge their addresses. See Exhibit A.

11. The geographic area of Local Board No. 44 contained over 40,000 residents in 1960 according to the United States Census taken in that year.

12. The geographic area of Local Board No. 44 contains many persons who would be willing to serve as local board members and who are qualified to serve under the Military Selective Service Act of 1967 and the regulations implementing that act (50 App. U.S.C. §460(b)(3) and 32 C.F.R. §1604.52(c) and (d)). This fact may be judicially noticed.

13. Local Board No. 44 is illegally constituted in that (a) two or more of the four Local Board Members are nonresidents of the local board area in violation of the regulation promulgated in Executive Order 11360, 32 F.R. 9787, July 4, 1967 (32 C.F.R. §1604.52) which States:

> The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction.
>
> * * * * *
>
> 32 C.F.R. §1604.52(c)

and (b) there are many qualified residents of the local board area who would be willing to serve as local board members.

14. It is "practicable" within the meaning of the Selective Service regulation (32 C.F.R. §1604.52(c)) for a quorum of members of Local Board No. 44 to be residents of the local board area.

15. Plaintiff was injured because his local board was not, as is contemplated in 32 C.F.R. §1604.51 and Executive Order 11360, composed of residents of his neighborhood or of the geographic area in which his local board is located and, therefore, plaintiff was deprived of the benefits of the local board concept when he submitted new evidence pertaining to conscientious objection and they considered that evidence without reopening after issuance of an induction order.

16. As a result of the illegal composition of plaintiff's local board the Order to Report for Induction issued to him by it is void.

17. Plaintiff has no adequate remedy at law and will be irreparably injured if required to submit to induction into the Armed Forces of the United States, unless immediate judicial action is taken. Plaintiff has no other alternatives except to submit to military jurisdiction in violation of his conscience and beliefs or to refuse to submit to induction which action will also violate his particular conscience and beliefs and which will subject him to probable criminal prosecution for asserting his legally protected rights. There are no formal or informal channels of redress within

the Selective Service System at this time which plaintiff has not exhausted. Moreover, a criminal prosecution may afford no remedy for plaintiff's challenge to the composition of his local board.

18. Plaintiff's claim can be adjudicated without "litigious interruption" of the Selective Service System and he is entitled to pre-induction judicial review.

Count II

19. Plaintiff realleges the allegations of paragraphs 1-3.

20. Plaintiff registered with Local Board No. 44 on December 29, 1964, the day after his 18th birthday, and thereafter the local board sent him Selective Service System Form 100 (Classification Questionnaire) to fill out, which the plaintiff did without claiming conscientious objector status.

21. On April 28, 1969, Local Board No. 44 mailed plaintiff an order to report for induction at 615 West Van Buren Street, Chicago, Illinois, on May 15, 1969.

22. On May 2, 1969, plaintiff wrote the local board requesting Selective Service System Form 150 (Special Form for Conscientious Objector).

23. On May 6, 1969, the local board mailed plaintiff the Selective Service System Form 150 and a Selective Service System Form 264 (Postponement of Induction) which postponed plaintiff's induction until an undesignated date.

24. Within 30 days after receiving Selective Service Form 150, plaintiff completed and sent said Form to his

local board stating inter alia "I do not believe that I, as a human being, have the right to take another life," and "I feel I am qualified to become a conscientious objector because of the 1965 U.S. Supreme Court decision (U. S. v. Daniel Seeger) and the Boston case of Heffron Sisson, Jr., 1969." Plaintiff also sent to the local board a copy of a psychology course report in which he had written as follows:

> I think that it is wrong to say that one religion is better than another because church and religion are man made institutions.
>
> * * * * *
>
> Anyone who turns to religion is looking for a partnership which means he is willing to make a deal. The usual price is a person's soul in return for happiness in the life after, if there is such a place. People are illogical. That they are willing to make a deal with an extrahuman, someone no one has ever met. But they are willing to stake their lives on a belief that he exists. . . . *If there is a God, he will leave all responsibility for individual action to man without judging him for it.*
>
> Psychology Report Number III, pp. 11-12 (found in plaintiff's Selective Service System file)

25. Plaintiff was invited to and did attend a meeting of the local board on June 10, 1969, where-at, according to the local board's summary, the following transpired:

> Registrant appeared and was sworn in by Mr. Sankey. Wants new information considered. Said he did not request C.O. classification because he did not feel he

would be qualified, also he thought he would be prosecuted like those burning their cards. Went to American Friends for Counseling. Thought to claim C.O. one would have to belong to a certain religion. Said he did not formally claim to be C.O. until after he received induction order. Said he had to make up his own mind regarding religion. Has one brother 20 years old. Does not ask brother's conviction. Presently working as a messenger for firm of attorneys.

Was taking Liberal Arts course at Triton Jr. College until he received his induction orders. Statements on SSS-150 were typed by secretary at work in order to be sure they were legible. He feels he does not have the fortitude to be a medic. Also if he would be a medic he would be helping another person to, at a later date, go out again and kill. Feels he is incompetent to be a medic at any hospital. He said he feels he must "speak his piece" now. "This is the third time I am stating I am not competent to serve in any medical profession." Said he could not serve in any hospital either military or private. Willing to do clerical or any other such type work in lieu of service. Feels doing clerical work in Army would still be taking part in the killing of others either directly or indirectly. Said he failed in school due to the pressures he was working under. He said it is not the popular thing to come out and state your feelings. However, when he got the induction order it was time to "draw the line." Said he would be willing to do institutional work such as maintenance work in hospital. Said he could live with himself doing that. He said he hopes to get additional letters within week. As per reference

(Series 111) on form 150 I have requested references and hope they shall be here within a week. I have in my car references from Michael Hordecke and Mike Czepil and I feel that they would serve no purpose if you do not believe my statements the first time. Told he will be notified of Board's decision.

Personal Interview summary (found in plaintiff's Selective Service file)

26. On June 11, 1969, the local board mailed plaintiff a letter stating:

> Please be advised that at the Local Board meeting held last evening it was the decision of the Members that: "All evidence considered. No change in the registrant's status resulting from circumstances over which he had no control. Classification not reopened."

27. Plaintiff thereafter submitted new materials in support of his claim pursuant to permission granted by the local board which then met and directed the following letter to be sent to Plaintiff:

> Dear Sir:
>
> At the local board meeting held August 12, 1969, your entire file was reviewed.
>
> Please be advised that the unanimous decision of the Board was: "All evidence considered. No change in registrant's status."
>
> You will be rescheduled for induction and notified by mail of the reporting date.
>
> Very truly yours,

28. The local board by its sweeping inquiry at the personal interview and by its pronouncement that the entire file was reviewed and that there was no change in plaintiff's status reached the merits of plaintiff's claim without mailing plaintiff a new Selective Service System Form 110 (Notice of Classification) or acknowledging its classification or reopening action or cancelling his order to report for induction, all in violation of Local Board Memorandum No. 41 and the regulations (32 C.F.R. §§1624.2, 1625.2, 1625.4, 1625.11, 1625.12, 1625.13 and 1625.14) thereby denying plaintiff the right of personal appearance and appeal and the benefit of the administrative expertise of the Selective Service System.

29. Plaintiff has no adequate remedy at law and will be irreparably injured if required to submit to induction into the Armed Forces of the United States, unless immediate judicial action is taken. Plaintiff has no other alternatives except to submit to military jurisdiction in violation of his conscience and beliefs or to refuse to submit to induction which action will also violate his particular conscience and beliefs and which will subject him to probable criminal prosecution for asserting his legally protected rights. There are no formal or informal channels of redress within the Selective Service System at this time which plaintiff has not exhausted. Additionally, there are no military remedies for the recognition of conscientious objector claims which have matured prior to induction.

30. Plaintiff's claim can be adjudicated without "litigious interruption" of the Selective Service System and he is entitled to pre-induction judicial review.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment:

A. Permitting him to proceed *in forma pauperis*.

B. Granting the injunctive relief prayed for below without bond or security.

C. Preliminarily enjoining and restraining defendants from inducting plaintiff into the Armed Forces of the United States during the pendency of this action.

D. Declaring Local Board No. 44 to be illegally constituted.

E. Declaring the induction order issued to plaintiff by Local Board No. 44 to be void.

F. Ordering the Members and Executive Secretary of Local Board No. 44 to cancel the Order to Report for Induction issued to the plaintiff by them.

G. Ordering and directing the defendants Lewis B. Hershey and John H. Hammack to exercise their powers to appoint and remove local board members so that a quorum of the Members of the Local Board No. 44 are residents of that local board area.

H. Enjoining and restraining defendants from inducting plaintiff into the Armed Forces of the United States until such time as a quorum of the Members of Local Board No. 44 are residents of that local board area.

I. In the alternative to C through H, declaring that plaintiff is entitled to raise and have adjudicated the issue of the illegal composition of Local Board No. 44 (a) in a prosecution resulting from his fail-

ure to submit to induction into the Armed Forces of the United States upon the order of that board or (b) in a habeas corpus action resulting from his submission to induction into the Armed Forces of the United States upon the order of the board.

J. Granting such other and further relief as the Court may deem just and proper.

K. Ordering defendant Members of Local Board No. 44 formally to reopen plaintiff's classification to consider and process plaintiff's application for conscientious objector status pursuant to the Selective Service System rules, regulations and memoranda.

L. Enjoining and restraining defendants from inducting plaintiff into the Armed Forces of the United States during the pendency of this action.

M. Ordering the Members and Executive Secretary of Local Board No. 44 to cancel the Order to Report for Induction issued to plaintiff by them.

N. Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

EDWARD T. JOYCE
Attorney for Plaintiff

JOSEPH BEELER
Attorney for Plaintiff

Joseph Beeler
Edward T. Joyce
One First National Plaza, Suite 3200
Chicago, Illinois 60670
Telephone: 329-7700

[Verified by John Czepil, Plaintiff, on November 7, 1969.]

Exhibit "A"

(Emblem)

SELECTIVE SERVICE SYSTEM
Local Board No. 44
Selective Service System
4931 W. Diversey Ave.
Chicago, Ill. 60639
(LOCAL BOARD STAMP)

IN REPLY, REFER TO:
SSS 11-44-46-285

October 29, 1969

Mr. John Czepil
2454 West Walton Street
Chicago, Illinois 60622

Dear Sir:

We acknowledge receipt of your letter requesting the names and addresses of the members and executive secretary of Local Board No. 44.

Following is a list of the Board Members; however we may not divulge their addresses:

Mr. Theodore Sankey
Mr. Richard J. Boryca
Mr. Edward W. Biedrzycki
Mr. Thomas Elukevich

The undersigned is the Executive Secretary for the local board.

Very truly yours,

FOR THE LOCAL BOARD

/s/ (MRS.) LILLIE RICHARDS
(Mrs.) Lillie Richards
Executive Secretary

Exhibit "B"

(Emblem)

SELECTIVE SERVICE SYSTEM

Local Board No. 44
Selective Service System
4931 W. Diversey Ave.
Chicago, Ill. 60639
(LOCAL BOARD STAMP)

IN REPLY, REFER TO:

June 11, 1969

Mr. John Czepil
2454 West Walton Street
Chicago, Illinois 60622

Dear Sir:

Please be advised that at the Local Board meeting held last evening it was the decision of the Members that: "All evidence considered. No change in the registrant's status resulting from circumstances over which he had no control. Classification not reopened."

Therefore you will be rescheduled for induction and notified by mail of the reporting date.

Very truly yours,

/s/ (MRS.) LILLIE RICHARDS
~~(Mrs.)~~ Lillie Richards
Executive Secretary

Exhibit "C"

(Emblem)

SELECTIVE SERVICE SYSTEM

Local Board No. 44
Selective Service System
4931 W. Diversey Ave.
Chicago, Ill. 60639
(LOCAL BOARD STAMP)

IN REPLY, REFER TO:

August 15, 1969

Mr. John Czepil
2454 West Walton Street
Chicago, Illinois 60622

Dear Sir:

At the local board meeting held August 12, 1969 your entire file was reviewed.

Please be advised that the unanimous decision of the Board was: "All evidence considered. No change in registrant's status."

You will be rescheduled for induction and notified by mail of the reporting date.

Very truly yours,

BY DIRECTION OF THE BOARD

/s/ (MRS.) LILLIE RICHARDS
(Mrs.) Lillie Richards
Executive Secretary

LIBRARY
SUPREME COURT, U. S.

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM 1970

[illegible] JOHN CRIBBS, PETITIONER

v.

CURTIS W. TARR, JR., [illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 244

JOHN CZECH, PETITIONER

v.

CURTIS W. TARR, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought a pre-induction suit in the United States District Court for the Northern District of Illinois, seeking to prohibit induction into the armed forces and, alternatively, to require the reconstitution of his local draft board (Pet. App. 18). His suit was premised on the claim that a Selective Service regulation requiring that local board members "if not all immediately become residents of the area in which their local board has jurisdiction" (32 C.F.R. 1604.52(c)), two of the four members of his local board did not reside within the

designated area.[1] The district court denied a preliminary injunction and dismissed the complaint.

The court of appeals affirmed, holding that, unlike the statutory requirement as to county residence, the area residence provision of the regulation is not mandatory or jurisdictional (Pet. App. 2). Since the board is to be considered as "a *de facto* board," the court ruled, its acts are valid and immune from collateral attack (Pet. App. 4). The court then concluded that petitioner could attack the composition of his local board only in a direct action "by proceedings in the nature of *quo warranto*" (Pet. App. 3).[2]

Petitioner registered with Selective Service on December 29, 1964 (Pet. App. 13). On April 28, 1969, he was ordered to report on May 15, 1969, for induction (Pet. App. 13). On May 2, 1969, he wrote to his board requesting SSS Form 150 to assert a claim to conscientious objector status (Pet. App. 13). The board furnished the form and postponed his induction (Pet. App. 13). Petitioner submitted the form, together with evidence relevant to his claim, and had a personal appearance before the board, at which he stated the basis

[1] Petitioner does not contend that any board members lived outside the *county* in which the board has jurisdiction, as required by statute (50 U.S.C. App. 460(b)(3)) (Pet. 7-12; Pet. App. 10-13).

[2] The court below said that "the Government concedes" that "persons having standing may attack the composition of Local Boards by proceedings in the nature of *quo warranto*." This is an inadvertance. The Government does not concede that *quo warranto* may be maintained except at the suit of a public officer.

of his claim (Pet. App. 14–16). After considering petitioner's claim, the board declined to change his classification (Pet. App. 16). A subsequent request for reconsideration, allegedly supported by new materials, was likewise considered and denied (Pet. App. 16). This suit followed.

I. Petitioner argues here that a pre-induction suit to enjoin his induction solely on the ground that his local board is unlawfully constituted under Selective Service regulation 32 CFR 1604.52(c) may be maintained under the decisions of this Court in *Oestereich v. Selective Service Board*, 393 U.S. 233, and *Breen v. Selective Service Board*, 396 U.S. 460 (Pet. 16–17). The contention rests on his reading of the questioned regulation as providing a jurisdictional requirement (Pet. 9–13).[1] As the court below correctly pointed out, however, the "only jurisdictional requirement as to place of residence" (Pet. App. 2) is in the statute: Board members must reside in the county or political subdivision in which the local board has jurisdiction (50 U.S.C. App. 460(b)(3)). The regulatory provision that they also reside in the same area is by its terms not absolute, but rather turns on a determination of practicability: 32 CFR 1604.52(c) provides that local board members shall be residents of the county in which the board is located and "shall also,

[1] Petitioner relied heavily on three district court cases in California: *United States v. Beltran*, 296 F. Supp. 385 (N.D. Cal.); *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal.); *United States v. DeMarco*, 2 S.S.L.R. 3201 (N.D. Cal.). We agree with the court below (Pet. App. 2–3) that these cases were wrongly decided. Cf. *United States v. Nikolaisen*, 306 F. Supp. 66 (N.D. Cal.), decided after *Beltran* and *DeMarco*.

if at all practicable, be residents of the area in which their local board has jurisdiction."

Non-compliance with this regulation is not alone sufficient to nullify action taken by a board said to be directorily constituted by reason of area residence. For the acts of draft boards, like those of malapportioned legislatures (cf. *Baker v. Carr*, 369 U.S. 186), "are acts of a de facto political authority." *Clay v. United States*, 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds *sub nom. Giordano v. United States*, 394 U.S. 310; *Sitler v. McNamara*, 398 F. 2d 893 (C.A. 3), certiorari denied, 395 U.S. 950. As such, they are valid despite irregularities in the composition of the board and are not subject to collateral attack. Cf. *Ex parte Ward*, 173 U.S. 452; *Jessen v. United States*, 242 F. 2d 243, 245 (C.A. 10); *United States v. Richmond*, 274 F. Supp. 33, 61 (C.D. Cal.). This principle, "founded upon considerations of policy and necessity" (*Norton v. Shelby County*, 118 U.S. 425, 441), applies with equal force whether the regulation is viewed as mandatory (cf. *United States v. Nusshaum*, 396 F. Supp. 66, 67 (N.D. Cal.)) or as directory (Pet. App. 2–3). As this Court observed in *Ex parte Ward*, *supra*, 173 U.S. at 456: "[T]he title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." See the government's brief in opposition in *United States v. Brooks*, No. 1330 Misc., O.T. 1969, pp. 13–15, certiorari denied, 397 U.S. 969.[1]

[1] In *United States v. Cabbage*, No. 19775 (C.A. 6, decided July 31, 1970), a criminal prosecution for refusal to report for and submit to induction, the Sixth Circuit declined to set aside

Moreover, even if the acts of the *de facto* board were subject to collateral attack, petitioner's claim may not be raised in a pre-induction suit. Cf. *Anderson v. Hershey*, 410 F. 2d 492, 496 n. 11 (C.A. 6); *Palazolo and Adams v. Tennessee Local Board No. 85*, No. 20681 (C.A. 6, decided August 7, 1970). But see *United States v. Mechanic*, 305 F. Supp. 995, 1001 (N.D. Cal.). As noted in *United States v. Beltran*, 306 F. Supp. 585, 588 (N.D. Cal.), a case on which petitioner relies, it is the fact that one or more members of the local board might not meet the area residency requirement has no direct bearing on the validity of the particular classification assigned to a registrant. Indeed, petitioner made no challenge to his classification within the Selective Service System. Nor has he maintained in these proceedings that the board's refusal to reclassify him as a conscientious objector "was without statutory basis and in conflict with [his] rights explicitly established by statute," as distinguished from a determination "dependent upon an act of judgment by the Board." *Clark v. Gabriel*, 393 U.S. 256, 258.

In these circumstances, petitioner's suit is not within the judicial exception to Section 10(b)(3) as enunciated in *Boyer'ch*, *supra*, and *Breen*, *supra* (Pet. App. 4). Any other conclusion would

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an induction order on the ground that the local board was not properly constituted under 32 CFR 1631.52(c). Since the order was invalidated on another ground, however, the court urged (without so ordering) that the board be reconstituted in accordance with the area residency requirement, stating that applicant Cabbage would not be subject to reclassification until this was done.

not only lead to great disruption of the functioning of the Selective Service process, but it also would produce precisely the sort of "litigious interruptions" Congress explicitly sought to avoid by enactment of Section 1(b)(3).[5] *See Clark v. Gabriel, supra*, 393 U.S. at 258.

2. (a) Nor should petitioner be permitted to maintain an action in the nature of mandamus under 28 U.S.C. 1361, purportedly seeking to compel respondents to reconstitute his local board. While this section confers original mandamus jurisdiction on district courts, it does not enlarge the scope of mandamus relief under the common-law writ. Cf. *Prairie Band of Potawatomie Tribe of Indians v. Udall*, 355 F. 2d 304 (C.A. 10), certiorari denied, 385 U.S. 831. Thus, such an action is available only to enforce "a duty owed to the plaintiff," and this must be a duty which is "ministerial, plainly defined and peremptory." *Giuffanti v. Hershey*, 296 F. Supp. 553 (S.D. N.Y.). The requirement to appoint area residents as local board members "if at all practicable" does not meet this standard. Cf. *Clondara v. United States*, 425 F. 2d 605 (C.A. 8), petition for certiorari pending, No. 5426, this Term; *United States v. Nussbaum, supra*; *United States v. Pedtke, supra*; *United States v. Bruns, supra*; *Hessen v. United States, supra*. Moreover, the area residency requirement has

[5] This section provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

[6] But see the three district court cases in California *(supra*, p. 3, n. 3) which conclude that 32 CFR 1605.52(c) is mandat

no direct bearing on the validity of action taken by the board (*supra*, p. 5). As recognized in *Knoll Associates, Inc.* v. *Dixon*, 232 F. Supp. 283, 285 (S.D. N.Y.), "judicial interference [under 28 U.S.C. 1364] is not warranted * * * if the alleged irregularities are of such nature as would not prevent a valid order ultimately issuing from the administrative agency."

(b) Even if there were a mandatory duty, here owing to the plaintiff, the dismissal of petitioner's mandamus action was nevertheless appropriate. None of the respondents named in this action is in a position to correct whatever defect there may be. No one of them is charged, by statute or otherwise, with the duty of appointing local board members. Under the applicable statute (50 U.S.C. App. 460(b)(3)), local board members are "appointed by the President from recommendations made by the respective governors * * *." Neither the President nor the governor is a defendant in this case, and the persons who are defendants have no power to make appointments. Accordingly, there is no basis for mandamus against these respondents to take action which they had no legal duty—or, indeed, ability—to perform. Cf. *Hudgins* v. *Circuit Court of Chesapeake, Virginia*, 294 F.

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tory rather than directory. This view has thus far been properly rejected by every circuit court which has considered the question. But cf. *United States* v. *Cahlan*, *supra*.

[1] Petitioner named the following officials as defendants: Director of Selective Service; Illinois State Director of Selective Service System; Armed Forces Entrance and Examining Station Commander, Chicago, Illinois; Members of Local Board No. 44; and the Executive Secretary of Local Board No. 44.

Supp. 258 (E.D. Va.); *Hill v. U.S. Board of Parole*, 257 F. Supp. 129 (M.D. Pa.).

(c) Petitioner contends, however, that the decision below effectively denies "to a registrant all conceivable avenues to challenge the composition of [his] Local Board" (Pet. 18). Yet, it is obvious that petitioner's real concern here is not in reconstituting his local board but in preventing his induction; under the guise of a mandamus action, he seeks in effect to restrain the board from issuing to him an order to report for induction. Such pre-induction injunctive relief is outside the scope of permissible remedies under 28 U.S.C. 1361. (cf. *Harris v. Federal Housing Administration*, 256 F. Supp. 757 (D. Md.)). It also involves an impermissible attempt to circumvent the limitations of Section 10(b)(3) of the Military Selective Service Act (50 U.S.C. App. 460(b)(3)) as this Court has interpreted that Section in *Oestereich*, *supra*, and *Breen*, *supra*.

For the reasons stated it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1970.

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SUPPLEMENTAL AND REPLY MEMORANDUM OF PETITIONER

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SUPPLEMENTAL AND REPLY MEMORANDUM OF PETITIONER

This memorandum is submitted principally for the purpose of alerting this Court to the fact that a recent decision of the United States Court of Appeals for the Sixth Circuit has created an irreconcilable conflict among the circuits on the only issue raised in the petition. Also, since the filing of the petition in this case several district court decisions have been handed down directly conflicting with the decision of the court below in the case at bar, and a decision by the Court of Appeals for the Fourth Circuit strongly suggests that another court of appeals disagrees with the court below. Moreover, some of the contentions in the Government's Memorandum in Opposition are so meritless that a brief reply is considered appropriate.

United States v. Cabbage

In *United States v. Cabbage*, —— F.2d ——, 3 SSLR 7 No. 19775 (6th Cir. July 31, 1970), the court held that the requirement in 32 C.F.R. 1604.52(c) that members of local draft boards must "if at all practicable, be residents of the area in which their local board has jurisdiction" is mandatory, and not simply directory. The Sixth Circuit reversed the conviction of the defendant in *Cabbage* on other grounds, but in so doing it also held that the defendant could not be subject to reclassification by his local board until it was reconstituted to comply with the regulation.[1]

The court said with regard to the residency requirements:

> "We find it intolerable, however, to send appellant back for reclassification by a board which the United States government has stipulated to be improperly constituted under the Selective Service regulation without any practical remedy for such violation. The principle of administration of the Selective Service system by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. Allegations of violation of the regulation in the constitution of Selective Service Boards are frequent and usually tied to suggestions that such violations are racially motivated." *Cabbage*, slip opinion, p. 9.

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[1] The discussion of *Cabbage* in the Government's brief, footnote 4, pages 4 and 5, is, at best, misleading. The Government says that the Sixth Circuit declined to set aside the induction order on account of the composition of the board, and that the court only "urged" that the board be reconstituted. In fact, the Court granted declaratory relief to the effect that the board was improperly constituted and that no action could be taken against Cabbage until it was reconstituted.

The effect of this decision is to create a clear conflict among the circuits, resolvable only by this Court, on the question of whether the residency requirements in §1604.52 (c) of the regulations are mandatory.

United States* v. *Bowen

Further support for the mandatory interpretation of §1604.52(c) is found in *United States* v. *Bowen*, 421 F.2d 193, 196 (4th Cir. 1970), where the court held that in a prosecution for refusal to submit to induction the residence of local board members was a material issue within the context of the criminal discovery rule, Rule 16 of the Federal Rules of Criminal Procedure. See also *Martin* v. *Neuschel*, 1 SSLR 3002 (E.D. Pa. Feb. 13, 1968), rev'd on other grounds, —— F.2d ——.

District Court Cases

Several recent district court decisions have held that the residency requirements for local board members under §1604.52(c) are mandatory and that a draft board which is improperly constituted, in violation of such regulation, is without jurisdiction to classify and otherwise deal with Selective Service registrants. *United States* v. *Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969); *United States* v. *Brock*, —— F. Supp. ——, 3 SSLR 3125 (N.D. Cal. February 26, 1970); *United States* v. *Clinton*, —— F. Supp. ——, Crim. No. 31857 (E.D. La. April 21, 1970).[2]

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[2] *United States* v. *Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969) relied upon by the Government, p. 3, fn. 3, Memorandum in Opposition, has been reversed on other grounds by the Ninth Circuit, and, in view of the reversal, and later decisions, is no longer persuasive authority for the government's position.

In view of the growing conflict among circuit and district courts on this question, it is urgent that this Court grant certiorari to resolve this significant question of Selective Service law.

De Facto Board

The Government's argument, that the acts of a *de facto* draft board may not be collaterally attacked, would not be applicable in the case at bar even if it were applicable to Selective Service cases generally. The suit at bar is a direct attack on the legitimacy of the constitution of Local Board 44. Petitioner in the case at bar seeks mandamus directing that the local board be reconstituted, and declaratory as well as injunctive relief in connection with such mandamus. The doctrine of *de facto* political authority relied upon by the Government at pages 4 and 5 of its brief is therefore inapplicable. Each of the cases cited by the Government deals with a collateral attack upon the acts of a *de facto* political entity. In none of the Government's cases did the party seek mandamus reconstituting an improperly composed local draft board.

Petitioner, however, cannot accept the Government's argument that the *de facto* board doctrine applies to an improperly constituted draft board. The decided weight of current authority indicates that a draft board which is improperly constituted under § 1604.52(c) is without jurisdiction to act, and that its actions may be collaterally attacked. *United States* v. *Lemke*, 310 F. Supp. 1298, 1301-1302 (N.D. Cal. 1969);[3] *United States* v. *Beltran*, 306

[3] The government's *de facto* argument rests heavily upon *Ex Parte Wayd*, 173 U.S. 452 (1889). The scholarly opinion of Judge Peckham in *Lemke* demolishes this reliance, and demonstrates the inapplicability of the *de facto* doctrine to Selective Service local boards.

F. Supp. 385, 388-389 (N.D. Cal. 1969); *United States* v. *Machado*, 306 F. Supp. 995, 999-1000 (N.D. Cal. 1969).

Under the Government's *de facto* argument a local board could violate a variety of regulations concerning eligibility for membership and still retain jurisdiction. For example, the Government would hold the acts of a local board legal even if the members were not citizens of the United States, residents of the county within the local board area, or were members of the armed forces or reserve components, or less than 30 years of age, or more than 75 years of age, 32 C.F.R. §1604.52. And the Government would logically have to apply the *de facto* doctrine to local boards in which a member was a first cousin or closer relationship by blood, marriage or adoption, or a subordinate in employment, or a partner or business associate of a registrant, or had some other disqualifying relationship to a registrant with whom it was dealing (32 C.F.R. §1604.55). This partial list should reveal the futility and absurdity of attempting to apply the *de facto* doctrine to Selective Service local boards.

Scope of Mandamus

The Government's attempt[4] to narrow the scope of mandamus relief is countered by extensive recent authority to the effect that mandamus is a remedy available to Selective Service registrants who are the victims of "regulatory lawlessness" by local boards. *Murray* v. *Vaughn*, 300 F. Supp. 688, 707 (D.R.I. 1969); *Turley* v. *Selective Service Local Board No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969); *Carey* v. *Local Board No. 2*, 297 F. Supp. 252, 254-55 (D. Conn. 1969), aff'd 412 F.2d 71 (2d Cir. 1969); *Foley* v. *Hershey*, 409 F.2d 827 (7th Cir. 1969); see Byse & Fiocca, Section 1361 of the Mandamus and Venue

[4] Pages 6 and 7, Memorandum in Opposition.

Act of 1962 and Nonstatutory Review of Federal Administrative Action, 81 HARV. L. REV. 308 (1967).

Proper Parties

The Government's contention that the defendants at bar are not the proper parties is thoroughly specious. The President has delegated his power to appoint members of local boards to the National Director of Selective Service. E.O. 8569, 3 C.F.R. 797 (1938-43 compilation), October 17, 1940; Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 17 (1967) (The Marshall Commission); *The Selective Service*, 76 YALE L.J. 160, 167 (1966). In addition, the National Director of Selective Service has plenary power to remove members of local boards without cause. 32 C.F.R. §1603.6(a) (1970). Obviously the National Director of Selective Service is the proper party to be sued for reconstitution of the local boards. Moreover, even the Governor's power of appointment is delegated to the State Director of Selective Service. See 32 C.F.R. §1604.11 (1970); Davis and Dolbeare, LITTLE GROUPS OF NEIGHBORS; THE SELECTIVE SERVICE SYSTEM, 66-67 (1968).

Pre-Induction Judicial Review

Contrary to the Government's argument, judicial review is clearly proper here where the question involved is whether the Selective Service System is complying with its own regulations, and not where the board's discretionary fact finding powers are under review. *Crane* v. *Hershey*, 410 F.2d 966 (1st Cir. 1969); *Bucher* v. *Selective Service System*, 421 F.2d 24, 27-29 (3d Cir. 1970); *National Student Association* v. *Hershey*, 412 F.2d 1103,

1107-09 (D.C. Cir. 1969); *Barker v. Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Murray v. Blatchford*, 307 F. Supp. 1038, 1057-58 (D.R.I. 1969); *Wiener v. Local Board No. 4*, 302 F. Supp. 266, 269 (D. Del. 1969); see *Shea v. Mitchell*, 421 F.2d 1161, 1165-66 (D.C. Cir. 1970).

CONCLUSION

The contention that a decision of this Court requiring the Selective Service System to comply with its own regulations will disrupt the system is tired and discredited. This Court should not "take such a dire view of the likely consequences" of a decision that the system must obey the law. *McKart v. United States*, 395 U.S. 185, 199-200 (1969); *Toussie v. United States*, 397 U.S. 112, 25 L.Ed.2d 156, 166 (1970).

Respectfully submitted,

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